IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 74

CLIFFORD TAGGART, ET AL.,

Petitioners,

vs.

WEINACKER'S, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF OF RESPONDENT.

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BRIEF OF RESPONDENT.

QUESTIONS PRESENTED.

The questions presented herein are:

(1) What are the correct standards to be used in accommodating pickets' right of free speech in a labor dispute with a conflicting right to the protection against interference with the retail business of the owner of the property on which the picketing is being conducted?

(2) Whether the State Court can apply the above standards to the determined facts and conclude to reasonably regulate such picketing?

(3) Whether the court below properly applied the correct standards to the physical circumstances of the instant case in concluding to regulate the picketing by limiting it to the adjacent public area?

STATEMENT OF THE CASE.

The indecipherable character of the hand-drawn diagram of Respondent's property submitted by Petitioners' (as their Appendix B to their Brief) renders it imperative for Respondent to clarify the facts to be considered by the Court. This can only be accomplished by submission of material which accurately portrays the physical circumstances of Respondent's property and the adjacent area.

Respondent concedes the absence of such material from the record below and the anoinaly presented by new matter being presented by means of Appendix. Substantial parts of the Petitioner's Statement of the Case, however, rely upon their spurious exhibit which is dehors the record and they therefore have no cause to complain of the submission of accurate, authenticated data.

The documents submitted by Respondent (which are contained in the Appendix to this Brief) are:

1. An Affidavit of Dewey West, an employee of Respondent, which accurately describes the physical circumstance of the property with an explanation of the fact that since the closing of the record below, a change in operations of the businesses on the premises has occurred in that lessees of Respondent are presently operating the retail grocery and drug business establishments on the premises (Appendix to this Brief, p. A1-A3). There are current photographs and a lease attached as Exhibits to the affidavit which are described as follows:

a. Photograph A portrays the office of Respondent presently located on the premises. (Appendix to this Brief, p. A5).

b. Photograph B portrays the public sidewalk adjacent to Government Street. The scene depicted indicates that cars entering the parking lot must slowly and carefully ne-

gotiate the narrow area available. The distance from the inside edge of the public sidewalk to the outside edge of the elevated porch in front of the Walgreens portion of the building is only 84 feet, 2 inches (Appendix to this Brief, p. A6).

c. Photograph C portrays a scene from the inside edge of the public sidewalk adjacent to Government Street across the parking lot depicting the clear visibility to the entrance into Delchamps store (Appendix to this Brief, p. A7).

d. Photograph D portrays the public sidewalk adjacent to Government Street between the Walgreens and Delchamps stores. This picture depicts the availability of a safe and adequately large public area for pickets to stand on either the double sidewalk which is 9 feet 7 inches wide or the single sidewalk which is 5 feet 7 inches wide and adjacent to a grass parking lot. Alongside the double sidewalk there is an indented entrance area where the street has been widened to the place where it joins the curb at such sidewalk (Appendix to this Brief, p. A8).

e. Photograph E portrays the intersection of Catherine and Government Streets and depicts the clear visibility over the 97 foot distance from the inside edge of the public sidewalk adjacent to Government Street to the outside edge of the elvated porch in front of Delchamps (Appendix to this Brief, p. A9).

f. Document F is the lease between Respondent and Delchamps, Inc. At pp. 3-4 thereof there is described the arrangement whereby Respondent is to be compensated on a percentage basis for gross sales in excess of the minimum rental (Appendix to this Brief, p. A10-A34).

2. A small plat demonstrates the layout of the premises (Appendix to this Brief, p. A35).

3. Three city maps of Mobile, Alabama which indicate

that property of Respondent is located in a residential area, in the center of town, and not in an outlying suburban area (Appendix to this Brief, p. A36-A38).

4. A large plat of the premises clearly indicates the extent of the parking area adjacent to the store building (Appendix to this Brief, p. A39).

5. A topographic survey of Respondent's property clearly indicates the distances between the adjacent public property and the building entrances on the private property (Appendix to this Brief, p. A40).

6. A floor plan depicts the layout of the operation of Respondent (Appendix to this Brief, p. A41).

In obtaining the above listed exhibits demonstrating the true physical circumstances [illegible] December 1969, Counsel for Respondent first learned of certain changed conditions in the operation of the subject property. Respondent submits that these changes in operation have not removed the case from the Court since because Respondent still owns the property, has a place of business located on the property and has a financial interest in the operations thereof. [illegible] as more fully set forth on pages 23 to 25, *infra*.

SUMMARY OF ARGUMENT

The picketing by Petitioners on the privately owned property of Respondent interfered with the operation of the single retail store on the property.

The Petitioners have premised their interference on the sole basis that the property was used in connection with a retail business, with its concomitant public invitation, and therefore, they contend, the property became public and available for their exercise of free speech rights.

The Court below properly balanced the respective rights

of the parties and found that the interference with Respondent's business caused by Petitioners' picketing was unreasonable under the physical circumstances presented since an effective channel of communication was available to Petitioners by picketing on the adjacent public sidewalk.

The Court below reasonably regulated the Petitioners' conduct by removing them to the proximate public sidewalk in accordance with the valid trespass laws of the State of Alabama.

Since the Alabama Court applied the standards propounded by this Court in reaching its unassailable conclusion as to the balance of rights in favor of Respondent, its judgment should prevail.

Jurisdiction of the Alabama Court is necessary in order to provide any relief whatsoever since there is no provision in the National Labor Relations Act by which the National Labor Relations Board is authorized to act to protect Respondent's valid rights.

The necessity of granting relief to Respondent herein involves a substantial concern of the state in protecting its citizens against the violence which could readily follow the exercise of self help.

The action of the Court below will not disturb any national policy of labor relations.

ARGUMENT

I A REGULATION OF FREE SPEECH WHICH DOES NOT ELIMINATE THE COMMUNICATION OF INFORMATION IS PROPER TO PROTECT A LAWFUL BUSINESS OPERATION

A The Court Is Confronted With Conflicting Constitutional Rights To Be Balanced Against Each Other.

Petitioners are claiming that their constitutional right to free speech grants them license to picket on the private parking lot and private access sidewalk adjacent to Respondent's store. Respondent counters that the picketing would substantially interfere with its right to preserve its property for the use to which it has been lawfully put, which also is a protected right under the Constitution. Thus, the Court is presented with a diametrically conflicting constitutionally protected right being asserted by each of the adverse parties.

This is not a case of first impression insofar as the legal principles involved since this Court has had considerable experience deciding conflicts between constitutional rights.

1. U.S. Const. Amends. I and XIV.
2. U.S. Const. Amends. V and XIV.

For example in *Breard v. Alexandria*, 341 U.S. 622 (1951), the constitutionally protected right of freedom of speech came into direct conflict with the right of the individual to be secure in his home. This Court decided in favor of the latter right and upheld the constitutionality of a state statute which banned solicitors from invading the premises of the individual homeowner without his permission or invitation. The Court stated:

> "Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. *Rights other than those of the advocates are involved.* By adjustment of the rights we can have both full liberty of expression and an orderly life." (Emphasis added.) 341 U.S. at 644.

and has developed an approach to resolution of such conflicts.

First, it is clear that both the exercise of the right asserted by Petitioners and that asserted by Respondent may be reasonably regulated for the purpose of preserving the right of the other. Neither right is absolute. Time and again, First Amendment rights have been regulated to protect the rights of the public or private [illegible]

Similarly, the right [illegible] individual freedom with the police power of the State, we concluded that in certain circumstances individual constitutional rights must give way to overriding considerations of public safety. In *Jacobson v. Massachusetts*, [illegible] proper for a physician to stop and treat a person who, the others would not have had [illegible] a crime. And in *Prince v. Massachusetts*, [illegible] the Court ruled that the State could prohibit [illegible] distributing literature on public sidewalks.

In *Watts v. United States*, [illegible] statute making it a crime to make a threat against the President did not amount to an unconstitutional restriction of freedom of speech. It has also been held that a State may [illegible] prohibit the burning of draft cards in violation of [illegible] policies. *United States v. O'Brien*, [illegible]. And this Court has held that the right of freedom of speech does not prevent the government from outlawing the distribution of [illegible] action by the forceful overthrow of the government. *United States v. [illegible]*, [illegible] U. S. [illegible] and that a statute could prohibit [illegible] which prohibited [illegible] unreasonable, obscene, with the purpose of [illegible] arts, courts sometimes [illegible] [illegible].

The Court sustained the [illegible] requiring the issuance of [illegible] of a parade in *Cox v. New Hampshire*, [illegible] in *Kovacs v. Cooper*, [illegible] sections under a local ordinance which prohibited the use of sound trucks on the streets in [illegible] U. S. 11 (1905), the Court held that the [illegible] ing disease was sufficient to [illegible] compulsory vaccination. [illegible] Sunday closing laws [illegible] beliefs required them to close [illegible] *Braunfeld v. Brown*, [illegible] U. S. [illegible].

within their domain, which is being attacked by Petitioners in this Court.[10]

In *Marshall Field & Co.* v. *N.L.R.B.*, 200 F. 2d 375 (C. A. 7, 1952)[11] the Court decided on the particular facts of that case that it was entirely proper to exclude solicitation from public non-selling areas of the retail store, such as waiting rooms, rest rooms, elevators and corridors. The decision followed the precise formula which we advance as being determinative here. The Court found that since the presence of solicitors would interfere with the conduct of the employer's business and no unique problems of communi-

10. Although the Respondent was afforded full opportunity, in accordance with the applicable statutes, to file counter-affidavits challenging the Petitioner's evidence it chose not to do so. See, Title 7, sections 1055 and 1061, Code of Alabama (1958). Having failed to meet this minimal prerequisite, Petitioner is hardly in a position to challenge the findings of the lower court at this late date. Rather, it is manifest that this Court must give the lower court's findings the same deference on appeal as the Alabama Supreme Court was required to give to them under Alabama law. Since under Alabama law the lower court's findings were not subject to *de novo* review by the Alabama Supreme Court, it is manifest that such review may not be made here in the Supreme Court. *Town* v. *Burgess*, 208 Ala. 35, 93 So. 850 (1922); *Daniel* v. *Birmingham Dental Mfg. Co.*, 207 Ala. 659, 93 So. 652 (1922); *D. B. Clayton & Associates* v. *McNaughton*, 279 Ala. 159, 182 So. 2d 780 (1966).

The Alabama Code provides that preliminary injunction proceedings be submitted upon the pleadings and the affidavits of the parties. Section 1055 specifically permits the filing of counter-affidavits at the initial stage of the proceeding, and under Section 1061, Petitioners were given a second opportunity to supply counter-affidavits in connection with their motion to dissolve the injunction. Petitioners once again failed to avail themselves of this procedure to raise issues of facts but rather chose to rely upon a jurisdictional argument. As in *Logan Valley*, *infra*, p. 15 where this Court refused to consider the preemption argument raised by Petitioners because it was not properly raised initially in the lower Pennsylvania courts, Petitioners are similarly precluded here from voicing objections to the facts found by the court below having failed to do so at the appropriate time in the proceedings.

11. Cited with approval in Petitioners' brief (pp. 40-41).

cation were raised by the exclusion of the union solicitation, the employer's business interest should prevail. As the Court noted with approval:

> "The Board has approved the prohibition of union solicitation and discussion on the selling floors and *related traffic facilities* of department stores even when the employees are off duty. *May Department Stores Co.*, 59 NLRB 976. The Board pointed out in that case that solicitation in such areas *may unduly interrupt or disturb the customer-salesperson relationship with a detrimental effect upon the employer's business.*" (Emphasis supplied) *id.*, at 380.

The facts in the present case supply a more compelling basis for regulation of Petitioners' conduct than those presented in *Marshall Field, supra.* The activity of Petitioners herein was conducted by non-employees, as well as employees, whose claimed rights are susceptible to greater regulation than those of employees,[12] and the activity involved was picketing, a more significant interference than mere solicitation.[13]

Petitioners appear to rely upon the fact that their activity was conducted on the exterior portions of the Respondent's property to distinguish this case from the above quoted language in *Marshall Field.* Yet, here Petitioners do not dispute the propriety of the decision of the Court below precluding the pickets from blocking ingress and egress of customers into Respondent's store. This portion of the injunction, as Petitioners inferentially concede, is indisputably proper. Petitioners have instead carefully restricted their attack on the lower court's ruling to dispute what they claim to be non-obstructive picketing on the

12. *N. L. R. B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956).
13. *Hughes* v. *Superior Court*, 339 U. S. 460 (1950).

exterior of the Respondent's property.[14] Petitioners thus appear to recognize that the presence of pickets either inside the store or in obstructing entrances could be properly enjoined as in *Marshall Field* because picketing in these locations would so seriously detract from the Respondent's effort to provide within a limited market space a site for the unobstructed conduct of business that an invasion thereof could be regulated.[15]

Clearly, therefore, the legal boundary of Petitioner's right to picket cannot be measured solely by the fact that Respondent has extended to the public an invitation to come upon and into its property to shop. To accept the invitee test as the sole determinative factor, as Petitioners' urge, would leave the property owner powerless to repel an invasion by pickets within the doorways or onto the sales floor of the store itself. Clearly, the line of permissible access must be assessed and drawn at the place where

14. In their brief (Pet. Br., p. 19), Petitioners argue: "Nor can the employer's bare property interest of itself justify banishment from the *exterior store grounds*" (emphasis supplied) and on p. 30 "... the injunction prohibits "trespassing upon the property of Weinacker's ... and that bars peaceful picketing anywhere on the *exterior grounds* of that property" (emphasis supplied). Likewise, the Brief of the AFL-CIO, as *amicus curiae*, states at p. 11, "But that does not mean there is an inevitable progression ... to the protection of pickets or pamphleteering *inside a store* ... and that calculus of interests does not entail a mindless extension of access for multipurpose area such as a street to an area devoted to selling."

15. See also p. 17 of Brief *Amicus Curiae* of the National Labor Relations Board in *Logan Valley, infra*, p. 15 which conceded that if entry were made on "the selling area of Weis store and disrupted its business ... the State [court by means of injunction] would not be barred from acting." Under the concepts advanced by Petitioners, drawing any permissible line would be impossible in this case because the same invitation is made to the public to come on each part of the Respondent's property. That is, those persons invited into the Weinacker store to shop were the exact persons invited onto the exterior portions to park and walk into the store, since Weinacker had exclusive possession of the entire tract in issue here.

the picketing can be said to unreasonably[16] interefere with Respondent's conduct of its business.

In the instant case, Respondent alleged, and proved, under the specific physical circumstances of its operation and property, that the conduct of Petitioners on the exterior portion of Respondent's private property had a disruptive effect.[17] It was on the basis of these physical circumstances that the picketing was regulated by moving the activity less than 100 feet away[18] from the store on the directly adjacent public sidewalks. The physical circumstances of this case, which include the character of the property, and the activity of the intruders, convinced the courts below that removal of the pickets to the public area closely adjacent to the premises was required to prevent interference with the rights of Respondent to conduct its business on its property.

Respondent does not suggest that as a matter of trespass law it can exercise absolute control over entry to its privately owned premises. Respondent recognizes that by inviting prospective customers to park and shop on its premises its historical title rights have become limited to such degree as declared by this Court. The classic claim of trespass, which does not concern actual injury and is predicated solely on the assertion of naked title, is not the grounds upon which Respondent's position rests. But, Respondent strongly urges that it does have a constitutionally guaranteed right to preserve its property for use in its lawful business, and to exclude avoidable interference

16 The interference becomes "unreasonable" upon balance against the rights of petitioner to an effective channel of communication as discussed in detail *infra*, p. 15 *et seq.*

17 Indeed, this disruptive effect was presumably intended by Petitioners who admittedly came onto the property "endeavoring to halt" the operation of Respondent. (Pet. Br. p. 5).

18 See Appendix to this Brief, pp. A6, A9, A10, A16.

therewith. This is the right of Respondent not mer
"naked title" which Respondent asserts before this Cour

C. The Constitutional Right Being Claimed by Petitioner

That Petitioners possess the right of free speech is no
disputed.[20] The concept of free speech involves the pro
tection of the right to communicate a point of view.[21] How
ever, this right to be able to freely communicate is not a
absolute right to be exercised at the unfettered discretio
of Petitioners. This Court has "vigorously and forth
rightly rejected" the faulty premise that "people who wan
to propagandize protests or views have a constitutiona
right to do so whenever, however and wherever the
please."[22] The Court below following the appropriat
premise, merely regulated the Petitioners' right in a rea
sonable manner, without requiring Petitioners' ability t
freely communicate its message in order to preserve the
equally protected Constitutional right of Respondent.[23]

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[20] The proposition challenged by Respondent is not that
their protection of the property of Respondent was requested
protection was required. The issue is whether Petitioners
Appellants by entering upon the property of Respondent
of Respondent by entering upon the property of Respondent
Petitioners' personal property on the property of Respondent

[21] Quotation omitted. See Lloyd Corp. v. Tanner, 407 U.S.
Cox v. New Hampshire, 312 U.S. 569, 574 (1941); Schneider v.
with approval the holding of Marsh v. Alabama, 326 U.S. 501
1968) all property rights were subordinated to the First Amend
even though the property owned was open to the public. Id. at
Petitioners' Brief, pp. 11-12. Petitioners argue that the Court
that the shopping center could not exclude persons who wished
Petitioners' Brief, p. 12. Petitioners misconstrue the opinion of
Court of the Supreme Court of California, 23 Cal. 3d 899, 907
Respondent's property was open to the public, but that the
court below.

D. The Criteria To Be Applied in Balancing the Conflicting Rights Involved in the Instant Case.

In its decision in *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968), an accommodation was reached on the facts of that case between the conflicting rights involved. The Court did not grant a license for private property picketing as Petitioners contend. Rather, the Court balanced the conflicting rights and reached an accommodation on the facts of that case.

First, in analyzing the rights claimed by the picket, the Court made a detailed review of the physical circumstances of the Logan Valley Shopping Center to determine the effect of the picket's exclusion therefrom on their channels of communication.

izers were denied access rights on the private road and parking lot, serving a manufacturing plant, for the purpose of disseminating information concerning organizational rights to plant employees. Again, as in *Marsh* before and *Logan Valley* following, the Court concerned itself with reviewing the available channels of communication. Finding that there were other means of communication readily available to the organizers, the Court held it was unnecessary to disturb the Company's property rights in reaching an accommodation between the conflicting rights involved.

The Court stated at page 112:

> "It is our judgment, however, that an employer may validly post his property against non-employee distribution of union literature if reasonable efforts by the Union through other available channels of communication will enable it to reach the employees with its message . . ."

E. The Balance Struck by the Court Below upon Analysis of the Physical Circumstances Was Proper.

The Court below properly applied the principles of *Logan Valley*, *Marsh* and *Babcock & Wilcox Co.* In striking a balance of the respective rights of the parties, the Court regarded as determinative the fact that effective channels of communication were otherwise available to the Petitioners if the picketing on the property was enjoined; conversely, it recognized ~~the~~ serious detriment to the Respondent's use of the property if the picketing on the property was not enjoined.

An analysis of the facts relied upon by the Court fully supports its conclusion that in the instant case, unlike *Logan Valley*, removal of the pickets to the perimeter would not seriously impair the channels of communication while a

failure to do so would seriously impair [illegible] ness operation.

The property here involved was a sin store with adjacent private parking facil operation covers approximately one-tent the Logan Valley Shopping Center.[25]

The entrances to the store building fac Street, which is to the south. On the nort ment Street and directly adjacent to Re erty are safe and commodious public side 5 feet, 7 inches to 9 feet, 7 inches in w parkways alongside the former portions walks are only 84 to 97 feet from the ste therefore signs displayed on the sidewalk a to people at the store entrance.[26] Vehicle street into the relatively narrow parking the store and must first carefully cross the

These physical circumstances of this c the case with which Petitioners could co employees and customers of Respondent fr safe, public sidewalk. Curiously, Petitio this factor, the effectiveness of picketing o public property, is "irrelevant." (Pet. B statement tacitly admits that Petitioners license to obtain access to Respondent's p solely because the property is incident to a ment serving the public. It also explains Pet to present any proof in the Court below establish any need for access to Respo property for its communication purposes, it is clear that for numerous reason

25. Calculated from the respective perime one-third of a mile here contrasted to 1.1 miles

26. Appendix to this Brief, pp. A6 to A9. A

under exclusion of the pickets from the private property would not impair the direct channel of communication to the Respondent's patrons and suppliers.

1. The proximity of the public area to the Respondent's front door permitted the pickets' signs to be clear to patrons entering or leaving the store. In *Logan Valley* on the other hand, the public area was so distant that the Court found it significant to comment that "thus the placards bearing the message must be read at a distance so great as to render them virtually undecipherable."

2. Cars approaching Respondent's property must stop (or slow down, at the least) to cross the public sidewalk before slowly maneuvering into the limited parking area. In *Logan Valley*, on the other hand, the autos could speedily proceed from a public highway across shorter terms, without crossing any pedestrian walk, into a substantially larger parking lot.

3. Here there is no danger from traffic to the pickets on the large public sidewalk or adjacent parkway. In *Logan Valley* on the other hand, the Court stated: "the pickets are placed in some danger by being forced to walk along heavily travelled roads along which traffic moves constantly at rates of speed varying from moderate to high." *Id.* at 322.

4. With only one entry on Respondent's property at the time of the picketing, there was no confusion as to which business was the object of the pickets' message. In *Logan Valley* on the other hand, the Court observed: "Finally, the requirement that the picketing take place outside the shopping center renders it very difficult for petitioners to limit its effect to Weis only." *Id.* at 320, n.10.

The salient difference between the factual circumstances in the instant case and those of *Logan Valley* do not make the principles of the latter case inapposite. Rather, they demonstrate that in applying the principles of that case, as well as those of *Marsh* and *Babcock & Wilcox Co.*, to the facts in this case, a different balance is struck.

Denial of access to the private property in the instant case clearly does not deprive Petitioners of their effective direct channels of communication at the situs of Respondent's store.

The other side of the balance—the significant interference with Respondent's use of its property which would have been occasioned if the pickets were allowed—is an equally distinguishable characteristic of this case from *Logan Valley*. Foremost was the probability of physical interference with the conduct of Respondent's business by the presence of pickets on the limited area here available for business purposes. It is almost inevitable that on a small lot pickets will impede entry, usurp the parking area or disrupt vehicle or pedestrian traffic. Under these circumstances, the prospects that such interference will cause an obstruction or escalate into a prospective breach of the peace,[27] thereby seriously interfering with Respondent's business operation, are eminently possible.

27. As found by the Alabama Supreme Court (Appendix A pp. 15a-16a):

> "It is true that the evidence does not show that a blow has been struck or any blood shed, and by some standards the trespass or picketing may be described perhaps correctly as peaceful. The obstruction of a person's use of an entrance to a building *by the presence of another person*, however, can be accomplished only by using, or threatening to use, physical force in some degree, large or small, depending on the restraint with which the persons involved govern their actions. Such obstruction can easily and quickly escalate into an affray which, even in the loose meaning of today's popular speech, cannot be properly called a peaceful affair." (Emphasis supplied.)

Indeed, the Court below specifically found the presence of the pickets to be obstructive to the conduct of the business. The Alabama Supreme Court stated as an unchallenged trial court finding (Appendix A, page 11a): "... this picketing . . . has been carried on in such a manner as to obstruct the customers of Complainant (Respondent) in entering and leaving the entrances. . . ." And Petitioners have admitted that "in this case as in *Logan Valley*, obstructive picketing, if any existed, would entitle a State court "to limit the location and manner of the picketing . . ." (Pet. Br. p. 29).

It is apparent, as it was to the Court below, that a substantially greater interference is caused by the presence of persons who have not come to shop with the business of a single store on a small lot as contrasted to the diffused, less measurable effect of such intrusion on the sidewalk of a business block as in *Marsh*, or a large shopping center as in *Logan Valley*. In addition, the Respondent's property has not been dedicated to public use to the extent of the private property involved in *Marsh* or *Logan Valley*. In *Marsh*[28] and *Logan Valley*,[29] the private property was utilized in part as a public thoroughfare. In the instant case, all of the Respondent's private property was used exclu-

28. In describing the business block in *Marsh*, the Court stated: "... residents ... make use of a company owned paved street and sidewalk ... in order to enter and leave the stores and the post office .... There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there."

29. In *Logan Valley* the Court declared the property to be quasi-public because, "Here the roadways provided for vehicular movement within the mall and the sidewalks leading from building to building are the functional equivalents of the streets and sidewalks of a normal business district."

sively in connection with the operation of its business[30] and therefore stranger use has a far more direct impact of creating a diversion from its business purpose.

In balancing the respective rights of the parties in accordance with the precepts established by this Court, the reasonable conclusion that the Court below reached from the facts is that Petitioners' picketing should be confined to the proximate public area directly adjacent to the Respondent's premises. There is no just reason to disturb this finding.

This is not the compelling case to strain the precedent in *Logan Valley* and produce an unjust result and bad law. There has been no showing by Petitioners of a need for a channel of communication. There has been a showing by Respondents of a substantial infringement with its right to conduct its lawful business. Affirming the issuance of the injunction, therefore, would preserve the Constitutional right of Respondent to conduct its business free from interference without any impairment of Petitioners' Constitutional right of communication. A contrary result would grant a license for any claim of First Amendment rights to prevail over valuable Fifth Amendment rights in virtually every factual context.

F. The Changed Circumstances Do Not Eliminate Respondent's Need for the Injunction Issued by the Court Below.

At the time of the proceedings below, Respondent conducted the entire retail grocery and drug store operation on its premises. Subsequently, as shown in the Exhibits in the Appendix to this Brief (particularly pp. A1 to A3 and exhibits thereto), these premises were leased by

30. As the Alabama Supreme Court found:

"The premises of the instant complainant are not shown to have acquired the character of a town or business block as in Marsh. . . ."

Respondent to two separate companies, Delchamps, Inc. and Walgreen's Inc., which separately operate the grocery and drug store respectively. Respondent has continued its ownership of the premises and maintains an office on the premises (Appendix to this Brief, p. A5).

Respondent asserts for the following reasons that a viable controversy still exists with Petitioners and that therefore the relief granted below is necessary to preserve its valuable rights and, accordingly, the judgment below should not be vacated.

First, Respondent continues to be physically located on the premises so that a recurrence of the picketing could be reasonably anticipated if the injunction below were dissolved. A case is not moot where conduct initially complained of is likely to recur or where the underlying questions presented to the court below persist. *Carroll v. President and Commissioners of Princess Anne*, 393 U. S. 175, 179 (1968).

Second, Respondent, as owner, has convenanted by lease with its tenants to keep the tenants in quiet enjoyment of the premises, as shown in page 2 of the lease with Delchamps, Inc. in Appendix to this Brief (p. A12). Therefore, Respondent has contracted the legal obligation to maintain the property free of interference with the tenants' possession. The potential recurrence of Petitioners' uninvited intrusion onto the property necessitates the injunction of the Court below to insure Respondent's performance of this covenant.

Third, Respondent has a direct pecuniary interest in the unobstructed use of the property by its tenants. The terms of the said leases provide for an additional rental to be paid to Respondent after the tenants reach a certain dollar amount of annual gross sales volume (Appendix to this Brief, pp. A13 to A14). The interference with the ten-

ants' conduct of business which can be reasonably foreseen from the presence of pickets on the premises, as had occurred previously, would undoubtedly cause a loss of sales revenue for the tenant and, accordingly, would cause a loss of rental income to Respondent.

Finally, the substantial legal issues between the parties hereto, as argued herein, have not been settled by the above change in circumstances.

II. THE NATIONAL LABOR RELATIONS ACT HAS NOT DISPLACED STATE COURT JURISIDICTION ESSENTIAL TO PRESERVE RESPONDENT'S RIGHT TO THE LAWFUL USE OF ITS PROPERTY AND THE UNINTERRUPTED CONDUCT OF ITS LAWFUL BUSINESS

A. Concurrent State Court Jurisdiction in This Area Would Not Interfere With a National Policy.

The exercise of traditional state power to regulate the conduct of its residents and to provide protection of their property interests, in the context of this case, does not interfere with any national policy of labor relations. Neither the labor relationship of Petitioners and Respondent nor any national labor policy are involved in the present controversy. The instant case is one which concerns conflicting Constitutional rights.

It is the province of this Court and not the National Labor Relations Board to interpret and enforce constitutional rights. Congress did not, indeed it could not, delegate a determination of claims involving conflicting Constitutional rights exclusively to the Board. Decisions of this Court, in this case, in *Logan Valley*, in *Marsh* and other cases in this area have enunciated the standards to be applied in reaching decisions in these matters. The subsequent determinations of the critical facts in any given cause to which such standards must be applied are particularly within the province of a local court and certainly

within any special expertise of the National Labor Relations Board. It cannot be reasonably concluded therefore that Congress intended that the Board usurp State responsibility for regulating the use of property, and the conduct of residents within its jurisdiction.

In *Linn v. Plant Guards Local 111*, 383 U. S. 53 (1966), the Court considered the effect on national labor policy of the recognition of a legitimate state interest in providing redress to an injured party for a libel. Although concurrent state jurisdiction was allowed, this Court eliminated any possible disparity of decisions among the states by promulgation of its own limitation on the availability of any state remedy. The Court held: "We therefore limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage." 383 U. S. at 64-65.

Similarly, the decision in *Vaca v. Sipes*, 386 U. S. 171, (1967) allowed state court jurisdiction of an individual cause of action for a union's breach of its duty of fair representation even though the cause arose out of federal labor law and already had been decided by the Board also to constitute an unfair labor practice. *Local 12, United Rubber Workers v. N. L. R. B.*, 368 F. 2d 12 (C. A. Five, 1966).

B. The Controversy Involved Activity Which Is Merely a "Peripheral Concern" of the Act.

In *San Diego Bldg. Trades Council v. Garmon*, 359 U. S. 236 (1959), the Court set forth the rules for determination of the existence of exclusive Federal jurisdiction of the National Labor Relations Act[1] over disputes arising out of labor relations. Justice Frankfurter stated:

[1] National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. Section 121, *et seq.*, hereinafter referred to as the "Act".

> "When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the state from acting. . . . When it is clear or may be fairly assumed that the activities which a state purports to regulate are prohibited by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8, due regard for the Federal enactment requires that state jurisdiction must yield." (pp. 243-244.)

The general rule then is that when conduct is "arguably regulated" by the Act, either protected under Section 7 or banned under Section 8, the states, as well as the federal courts, must defer to the exclusive competence of the National Labor Relations Board.

Petitioners declare that the issues involved in this proceeding fall within the general rule that the Alabama courts are preempted simply because they allege that primary picketing in support of a labor strike is "within the heartland of statutory protection" (Pet. Br., p. 36) and therefore arguably regulated by the Act.[32]

The fact is, however, that Congress, indeed the Federal

[32] Petitioners base their entire claim of preemption upon Section 7 of the Act which protects "concerted activities for the purpose of . . . mutual aid or protection. . . ." This is the sole justification advanced for the claim that the subject of primary picketing in support of an economic strike is within the embrace of the Act. They no doubt base this view on the dissenting opinion of Justice Harlan in *Logan Valley* which states that "from our past decisions [it seems clear] that the petitioner has a substantial preemption claim." The decisions cited in support of this position are distinguishable, however, on the basis that in each instance the Board sought relief on behalf of employees or unions against a property owner for interference with access to property, *which interference of the property owner was allegedly violative of the Act*. There are no cases in which the Board granted relief to the property owner for unlawful interference with his property rights because the Board has no authority under the Act to grant such relief.

Government[33] is powerless to regulate peaceful primary picketing in support of an economic strike such as is involved in this case, which is a condition Petitioners tacitly admit (Pet. Bf., pp. 35-36).[34]

The absence of any authority of the Board to grant relief where appropriate, coupled with Petitioners' claim of preemption, would leave Respondent without any procedure or forum available for the assertion of his lawful rights.

For purposes of illustration of this unreasonable result, assume stranger picketing occurred in the employee's parking lot of the *Babcock & Wilcox Co.*, an area already determined by the Court to be off-limits to such pickets (*supra*, pp. 17-18). There is no provision in the Act which would outlaw the conduct; Respondent could obtain no relief from the Board in such case. In fact, as Petitioners contend in their argument this picketing would constitute "concerted

33. Norris-LaGuardia Act, 47 Stat. 70; 29 U. S. C. 101-115.

34. *Cf. Organizing and The Law*, A Handbook For Union Organizers, by Stephen I. Schlossberg, General Counsel, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), 1967, at p. 40:

> "If a professional organizer hands out union literature on the ordinary employer's property over the employer's objection in the absence of the exceptional circumstances mentioned above, he does *so without the protection of the Labor Act*. The employer does not violate the law by posting his property. He is permitted to call the police to cause an arrest for trespassing, and finally he can, by self-help, use reasonable means to eject the organizer from the property. *There is, however, no section of the Taft-Hartley Act available to the employer in this situation.*" (Emphasis supplied.)

The "exceptional circumstances" referred to by Mr. Schlossberg included entry on shopping center property, where, under the facts of the case, entry would be authorized. Although the *Logan Valley* case arose after Mr. Schlossberg's handbook had been written, it presented an example of such an exceptional circumstance. *Logan Valley* by reason of the facts of the communications problem inherent in exclusion, coupled with the lack of any interference by picketing with the business operation and use of the property, rendered it necessary to allow the organizer to lawfully come onto the premises.

activities for the purpose of the mutual aid or protection", the generally defined protected activity. Then, even though this Court had already found the place of the picketing to be improper, upon application of the preemption doctrine urged by Petitioners, the courts would be powerless to remedy the situation. In what way could the judicially determined right of the property owner be protected?

The possibility of this obviously undesirable result was noted by the Illinois Supreme Court in *People v. Godutty*, 121 Ill. 2d 605, cert. den. 368 U. S. 927 (1961): "In [Babcock & Wilcox Co.] . . . the Court recognizes the property interest of the employer to be superior to the interest of the Union in having a convenient means of communicating with employees. The notice or order of the employer is of little consequence, however, if it cannot be enforced." The Court therein upheld a conviction of criminal trespass.

In factual circumstance, as presented herein, where there is no remedy provided in the Act for an injury, an exception to the general rule in *Garmon* must be applied. This exception as stated by Justice Frankfurter is:

> "However, due regard for the pre-suppositions of our embracing federal system, including the principle of diffusion of power, not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the states of power to regulate *when the activity regulated was a merely peripheral concern of the National Labor Relations Act.*" (Emphasis supplied.)

The unavailability of any Board remedy is a cogent reason for the application of this exception and accordingly the jurisdiction of the court below should not be held to have been preempted by the Act.

C. The Decision Below "Touches Interests Deeply Rooted in Local Feeling and Responsibility."

Perhaps the strongest argument against a finding that state court jurisdiction has been displaced is the nature of the protection sought below. Petitioners entered Respondent's property and picketed; this activity interfered with Respondent's conduct of its retail business. When requested to discontinue their disruptive activity, Petitioner refused. Thus confronted by an invasion of its property which threatened the continued conduct of its lawful business, Respondent applied to the state court for an injunction. No other court or agency had the authority to provide such relief in this case.

The State has the primary responsibility for the protection of the property interests of its citizens through application of its valid trespass laws. In fact, state courts have historically and consistently decided controversies and provided the appropriate remedies to be afforded, whether criminal or civil, when conduct involved entry upon the property of another without consent, even though such cases involved picketing by labor unions or claims of justification based upon Constitutional guarantees.[35]

35. *People ex rel. Koester v. Rozensweig*, 171 Misc. 702, 13 N. Y. S. 2d 795 (1939); *Hotel and Restaurant Employees Local 802 v. Asimos*, 216 Ark. 694, 227 S. W. 2d 154 (1950); *Millmen Union, Local 324 v. MKT Railroad Co.*, 253 S. W. 2d 450 (Tex. Civ. App., 1952); *People v. Gabuto*, 21 Ill. 2d 605, 174 N. E. 2d 385 (1961); *cert. den.*, 368 U. S. 927; *Moreland Corp. v. Retail Store Employees Union, Local 444*, 16 Wis. 2d 499, 114 N. W. 2d 876 (1962); *Amalgamated Clothing Workers v. Wonderland Shopping Center*, 370 Mich. 547, 122 N. W. 2d 785 (1963); *Stafford v. Hood*, 213 Tenn. 684, 378 S. W. 2d 766 (1964); *Schwartz-Torrance Investment Corp. v. Bakery Workers, Local 31*, 61 Cal. 2d 766, 40 Cal. Reptr. 233, 394 P. 2d 921 (1964); *cert. den.*, 380 U. S. 906; *People v. Poe*, 236 Cal. App. 2d Supp. 928, 47 Cal. Reptr. 670 (1965); *People v. Weinberg*, 6 Mich. App. 345, 149 N. W. 2d 248 (1967); *Blue Ridge Shopping Center v. Schleininger*, 416 S. W. 2d 633 (S. Ct. Mo., July 10, 1967); and *State, v. Quinnell*, 151 N. W. 2d 598 (1967). (See also *Whittlesey v. United States*, 221 A. 2d 86 (Ct. App., D. C., 1966).

The instant controversy, therefore, squarely fits the second exception to the general rule of preemption as stated in *Garmon* that:

> "... the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress has deprived the State of the power to act."

In *Linn*, the Court applied this exception, recognizing "an overriding state interest in protecting its residents from malicious libels. ..."[36] This interest flowed from the absence of any legal remedy, if the states were preempted, in such a situation. In such a case, the probability of the exercise of self help and the possibility of such acts escalating into violence, created a serious threat to domestic peace, precisely as noted in *Linn* at page 64, note 6:

> "... the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands. The function of libel suits in preventing violence has long been recognized. ..."

In *Linn*, therefore, the Court concluded that the State's concern in providing redress for malicious libel was so "deeply rooted in local feeling and responsibility" that it fit within the exceptions specifically carved out by *Garmon*.

In *Vaca* v. *Sipes*, *supra*, this same possibility that the injured party could be left remediless upon a finding of preemption was compelling to this court in finding that Congress could not have intended to preempt the area there involved.

36. The Board already had jurisdiction over the labor dispute in *Linn*; further, as noted by the Court, if the false statements were coercive or misleading, they could have constituted an unfair labor practice under Section 8.

The authority of the States, as claimed by Petitioner, to provide a remedy for the unauthorized entry onto private property, and the absence of any Federal remedy in such a case (see pp. 25-34 *et seq. supra*), would inevitably result in the same need for, and actually resort to, self-help and the same concomitant imminent threat of violence. "The basic purpose of the [trespass] statute is the prevention of violence or threats of violence." *People v. Gadalis*, 21 Ill. 2d 605, at 609, cert. den. 368 U. S. 927 (1961). As stated in *Lyon* (at p. 82), "Intimidation and threats of violence no less than actual violence, affect such compelling state interest as to permit the exercise of state jurisdiction." A finding of exclusive Board jurisdiction, and the resulting displacement of State power, would thus result in a regulatory vacuum in the precise area closely coincident to that described in *Weber, Inc. v. Int'l. Bro. of Elec. Wkrs.*, 348 U. S. 468 (1955), *Wisconsin Emp. Rel. Bd.*, 351 U. S. 266 (1956), at pp. 274-275:

> "The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by violence and destruction. We would not interpret an act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect."

The preservation of the property rights claimed by Petitioner herein lies within the area of traditional state protection under its trespass laws. The protection of such rights involves "the overriding state interest . . . involved in the maintenance of domestic peace." (*Plumbers' Union v. Borden*, 373 U. S. 690, 696 (1963)).

The repose of exclusive jurisdiction in the National Labor Relations Board therefore would seriously interfere with the discharge of the State's responsibility to protect the substantive rights of its residents.

CONCLUSION

It is respectfully submitted that the Alabama Supreme Court, in a proper exercise of its jurisdiction and by application of the standards propounded by this Court to the facts before it, properly concluded that the Respondent should be protected by injunctive relief against the Petitioners' interference with its lawful use of its property.

Accordingly, the judgment of the Alabama Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX.

STATE OF ALABAMA,
COUNTY OF MOBILE.

Personally appeared before me the undersigned Notary Public, in said County in said State, Dewey West, known to me, who, after first being duly sworn did depose and say as follows:

My name is Dewey West; I am Bookkeeper for Weinacker Bros. Inc., and have been such for about one and one-half years. Prior to that, I was employed by this Company for four years as Office Assistant. I was so employed when the picketing by the Retail Clerks Union, which is the subject of this suit (*Taggart, et al. v. Weinacker Bros. Inc.*, Alabama Supreme Court, First Division No. 295, Circuit Court of Mobile County, in Equity, Case Number 63,733 McC).

Since the hearing in the instant case in the Circuit Court of Mobile, Weinacker Bros., Inc., has ceased to operate a grocery and drug business; however, it retains an office in the building formerly housing its stores as is evidenced by photograph marked Exhibit A attached hereto and incorporated herein.

Weinacker Bros. Inc. continues to own the land and buildings at the location of its former grocery and drug operations and leases space therein to two entirely separate tenants, viz: Delchamps, Inc. a retail grocery store and Walgreen's Inc., a retail drug store. Since said lease to Delchamps, Inc. on or about October 21, 1966, [D. W.] I have continued to work in the office of Weinacker Bros. at the building and have had occasion to observe the

parking lot, sidewalks, signs and general exterior, including traffic conditions just as I had prior to said lease. There has been no material change since that time.

Vehicles entering the parking lot surrounding these two stores enter very slowly because of traffic conditions. I have personally stood on the sidewalk opposite the Walgreen's entrance, see Exhibit B attached hereto and opposite the Delchamps entrance, see photograph attached hereto and marked exhibit C, and observed the slow entry of cars into this parking lot. At the same time, I measured with a steel tape the distance from the inside edge of the public sidewalk to the outside edge of the elevated front porch in front of each of these entrances. The distance, when measured perpendicular from the inside edge of the public sidewalk to the outside edge of the raised cement porch at the entrance to Walgreen's Inc. was 84' 2". The distance to Delchamps' raised porch was 97', see Exhibit E attached hereto and incorporated herein. Signs in the windows of these stores were legible to me. From the sidewalk in front of Delchamps Inc. I could easily read letters which were 3¼" in height; from the sidewalk directly in front of Walgreens Inc. I could easily read letter 3¼" in height and I could also read letters which were only 2" in height on the signs they displayed on the windows. These windows were approximately 4 feet further from me when I was on the public sidewalk than the front edge of the raised porch in front of these entrances. In other words, these signs were on the store windows some four feet beyond the measured distances referred to above.

I am a person of average visibility and wear glasses both for distance and for reading.

I also measured the public sidewalk North of Government Street, between the Walgreens and Delchamps stores and Government Street. As is apparent in Exhibit D attached hereto and incorporated herein, the double sidewalk is 9' 7"

wider, whereas the single sidewalk shown thereon is 5' 7" in width. It will be observed from these exhibits there is a grass plot lying between the single sidewalk shown in Exhibit D and Government Street which I measured to be 18' wide. At the point where the double sidewalk exists, there is an indented parking or entrance area where the street has been widened to a point where it joins the curb at the double sidewalk.

While the picketing was going on, on the double public sidewalk and on the single sidewalk as shown in Exhibit D, I observed and read without any difficulty the picket signs which I was standing on the raised porch in front of the entrances of what is presently Delchamps Inc. and Walgreens Inc. The distances thereof being, respectively, 97' and 84' 2".

I am very familiar with the matters, parking lot, building and surrounding area shown in each of the attached Exhibits A-E and do hereby affirm that each is a true and accurate representation of the scene and of the buildings, parking lot and sidewalks as the same existed on December 23, 1969 and was during the proceedings involved in said case, the only change being in the names and type of store designations and of course, advertising material.

I am also attaching hereto the lease to Delchamps Inc. which is marked Exhibit F and incorporated herein which is similar to the Walgreen's lease, the chief difference between the two being that we have a building obligation under the Walgreen's lease.

Further Deponent saith, not.

s/ DEWEY WEST
Dewey West

Subscribed and sworn to before me this 23 day of December, 1969.

(SEAL)

ELLEN EDWARDS,
Notary Public, Mobile County, Alabama.

EXHIBIT A.

EXHIBIT B

EXHIBIT D.

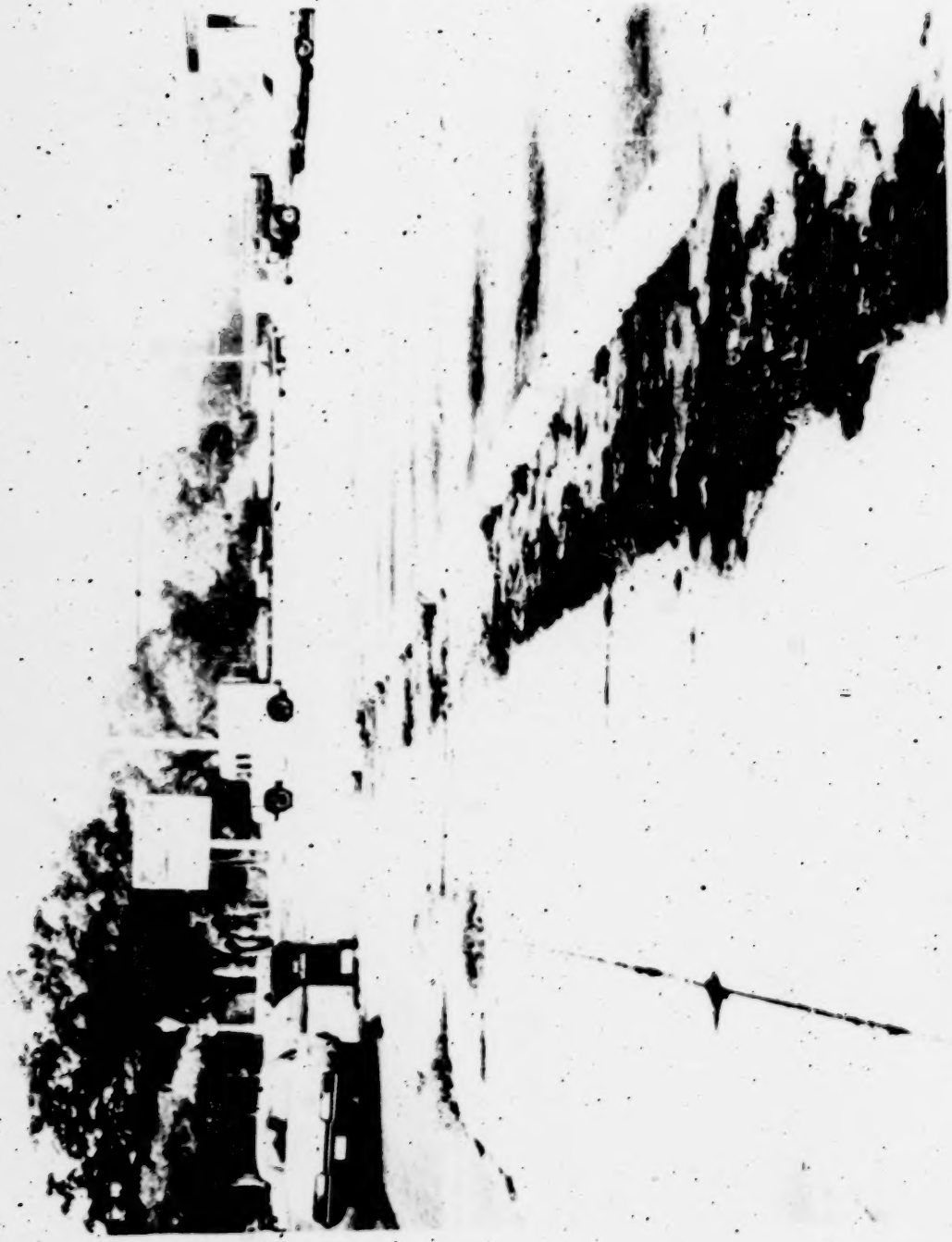

EXHIBIT E

EXHIBIT F

MOBILE ALABAMA

October 21, 1966

Weinacker Brothers, Inc.
1950 Government Street
Mobile, Alabama

Gentlemen:

Reference is made to the lease agreement dated October 21, 1966, made by you to the undersigned with respect to the grocery department situated in Weinacker's Shopping Center, located in the City of Mobile at Catherine and Government Streets, outlined in red on Exhibit "A" attached to and made a part hereof of such lease.

In connection with and as a part of this lease agreement we agree with you that so long as you remain the landlord you will cause the undersigned to be included as a named assured in the liability policy with respect to the parking area shown on Exhibit "A" attached to this lease, and we will reimburse you to the extent a prorata of such premium paid for the liability insurance covering the parking area equals the prorata parking area outlined in green on Exhibit "A" attached to this lease bears to the total parking area shown on such Exhibit "A".

Very truly yours,

DELCHAMPS, INC.

A. F. Delchamps, Jr.
Executive Vice President

ATTEST:

Secretary-Treasurer

Beginning at the Northwest corner of Catherine and Government Streets and running thence Northwardly along the West line of Catherine Street three hundred five and five-tenths (305.5) feet, more or less, to the South line of property now or formerly of Louisa Fuller, thence running Westwardly along the South line of said property of Fuller eighty-one (81)

WITNESSETH:

thence running Westwardly along a straight line two hundred sixty-eight (268) feet to a point which is three hundred fifty-four (354) feet from Government Street, thence running Southwardly along a straight line one hundred fifty-one (151) feet to a point, thence Westwardly along a straight line parallel with Government Street one hundred twenty-six feet to a point, thence Southwardly ten (10) feet to a point, thence Westwardly along a line parallel with Government Street one hundred forty-six (146) feet to the East side of Macy Street, thence Southwardly along the East side of Macy Street one hundred ninety (190) feet to the Northeast corner of Macy and Government Streets, thence running Eastwardly along the North side of Government Street four hundred fifty (450) feet, more or less, to the point of beginning.

TERM

FOR TENANT TO HAVE AND TO HOLD from the date when tenant opens the demised premises for continuous use and occupation by tenant as a Supermarket and for no other different use or purpose for and during the term of 15 years, all subject to the terms, conditions, stipulations and covenants herein contained; and landlord covenants to keep tenant in quiet possession of the demised premises during said term and any extension thereof. If tenant opens for business in the demised premises on a day other than the first day of a calendar month, then, and in that event, tenant shall pay landlord, in addition to any other rent, the fractional part of $ 1,962.50. Tenant shall not be required to open the demised premises for business, and no rent shall commence hereunder, until (a) the demised premises have been delivered to tenant completed in accordance with plans and specifications and (b) landlord has completed construction of all of the common areas shown on Exhibit "A" Delivery of the demised premises shall not be made between December 5, 1966 and January 2, 1967

Date 10-11-66

DELETED

and maintain the same in good repair and usable condition for use by the patrons of the shopping center and the tenant and their employees during the term of this lease and any extensions thereof. The arrangements and location of all store buildings and common areas (including parking area) within the shopping center shall at all times during the term of this lease, or any extensions thereof, be maintained as shown on Exhibit "A" and shall not be changed without the written consent of tenant. Landlord guarantees that there shall never be less than five (5) automobile parking spaces in the shopping center for every 1000 square feet of ground floor area of leasable buildings.

[illegible] Landlord may from time to time erect additional store buildings in the shopping center (but only in the areas reserved and designated therefor on Exhibit "A"). Landlord agrees not to erect any buildings, service stations or structures on any area designated and reserved on Exhibit "A" for parking, service areas, entranceways and ways for ingress and egress. Landlord agrees to abide by the front building setback line for the overall shopping center and to provide adequate entranceways, ways for ingress and egress and service areas, and further agrees that tenant shall have uninterrupted use and enjoyment of the entranceways, ways for ingress and egress, the parking areas and the parking areas shown on Exhibit "A" without interference with said use and enjoyment of conduct of tenant's business by [illegible] Landlord [illegible] to the shopping center or otherwise.

[illegible]

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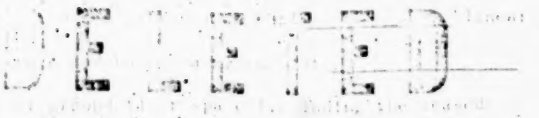
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thereof, at the option of landlord or at the option of tenant, which said option shall be exercised by notice in writing given to landlord and tenant, as the case may be, within thirty (30) days after the occurrence of such damage or destruction, this lease shall terminate and no rent shall be paid by tenant for the period subsequent to the date of such damage or destruction. If this lease shall terminate as aforesaid and any rent shall have been paid by tenant in advance, landlord agrees to refund to tenant all rent so paid applicable to the period subsequent to such damage or destruction.

If any of the buildings in the shopping center (other than the building on the leased premises) be partially or substantially destroyed by fire or other casualty and landlord fails within six (6) months after the date of such damage or destruction to begin restoration and to have completed such restoration within twelve (12) months from the date of such damage or destruction, tenant may, at its option, cancel this lease by written notification to landlord within sixty (60) days after the expiration of said six (6) month period or within sixty (60) days after the expiration of said twelve (12) month period.

Landlord and tenant shall each look solely to his own insurance in the event of destruction or damage to the property of either. Neither landlord nor tenant shall be under obligation to pay any amount to the other, its successors or assigns, or to the insurance company issuing the policy of insurance for the amount of insurance or damages even though the loss or damage is caused by the negligence of the other, its agents or employees.

If so much of the demised premises or of the remaining area within the shopping center (including the parking area) be taken by any utility or governmental authority or agency having the power to condemn or take private property as to interfere with access to or use of the demised premises or adversely affects the economics of tenant's business thereon or reduces or impairs the amount of business conducted on the leased premises, or reduces the square footage in the demised premises as much as ten (10%) per cent, then, and in either of such events, tenant may, at its option and at any time within six (6) months after such taking, by written notice to landlord, terminate this lease. Tenant, upon any taking, shall be entitled, in addition to any other damages allowed it by law, to so much of the award as will compensate it for loss of business and cost of removal of stock and stock fixtures.

Landlord, during the term of this lease, or any extension thereof, agrees to pay all real property or ad valorem taxes that may be levied or assessed against the land and improvements in the shopping center, including the demised premises and tenant agrees to pay all taxes levied or assessed against its fixtures, equipment and personal property.

Landlord agrees with tenant (and this agreement is a material consideration for the execution of this lease by tenant) that, so long as this lease is in effect (whether extended or not), landlord will not lease or permit to be leased to any other tenant any business or other building in the shopping center or any property or building which is now owned or may hereafter be owned by landlord or by a corporation or other business entity in which landlord has or may hereafter have the majority of stock or interest therein and which is located within one and one-half (1 1/2) miles radius of the shopping center, to be used or occupied by any tenant or other party for the purpose of operating a supermarket or any other store that would carry fifty (50%) per cent or more of items of a kind, style or classification that would be similar or identical to the kind, style or classification carried by tenant.

Should landlord default under the "EXCLUSIVE" section of this lease, tenant shall have the right, so long as this default shall continue, to discontinue the payment of minimum rental.

At any time after minimum rental has been discontinued for ninety (90) days, and while landlord remains in default, the tenant may cancel this lease by a thirty (30) day written notice to landlord.

SURRENDER OF PREMISES

The tenant shall, at the termination of this lease, peacefully quit, surrender and deliver up to the landlord, its successors or assigns, the leased premises in as good condition as they were on the commencement date of this lease, with the exception of usual wear and tear, fire, the elements, Act of God, civil riot, war, insurrection, or other unavoidable casualty irrespective of the cause thereof.

SIGNS

Tenant may erect signs on the exterior and interior of the demised premises. Tenant may also erect a changeable copy sign in the parking lot at a location to be approved by the Landlord. Landlord shall not permit or allow any one to erect any sign in the shopping center other than a tenant or outdoor advertising companies. Any signs installed by tenant shall be at its own expense and may be removed at the termination of this lease.

Any damage to the building as a result of the removal of tenant's signs shall be repaired at the expense of the tenant.

ATTORNEY FEES

In the event of default on the part of tenant and the employment of an attorney for the collection of any amount due hereunder, or for the institution of any suit for possession of said property, or for service incident to the breach of any other condition of this lease by tenant, or on account of bankruptcy proceedings by or against tenant, or legal process being issued against the furniture and effects of tenant, located upon the leased premises, or the leasehold interest of tenant, tenant agrees to pay and shall be taxed with a reasonable attorney's fee, which fee shall be a part of the debt evidenced and secured by this lease.

BINDING ON SUCCESSORS IN INTEREST

Every provision hereof applicable to landlord and every provision hereof applicable to tenant shall also bind, apply to and run in favor of "their respective successors in interest" as fully as if said quoted words were inserted after the words "landlord" and "tenant" wherever they appear herein, except that this provision shall not permit the assignment of the lease by tenant, or the subleasing of the premises except on the conditions herein imposed.

Landlord agrees, during the term of this lease, and extension thereof, and at its sole cost and expense, to maintain the parking area; to provide proper grade level and drainage for said parking area; to install and maintain adequate lighting facilities and time clock connected to a master electrical meter; to keep the parking area lighted, striped, clean and free from all debris and available at all times as a free parking lot for customers of the shopping center; except that tenant agrees to keep the parking area outlined in green on Exhibit "A" attached to this lease striped, clean and free from all debris so long as Weinacker Brothers, Inc., remains the landlord; this exception in nowise removing the other responsibilities of the landlord stipulated for the entire parking area. Landlord shall also keep the parking lot lights on for the entire shopping center each weekday from dusk until 10:00 P. M., but this shall not be construed as giving the landlord the right to govern the tenant's business hours.

DEFAULT BY LANDLORD

If landlord should default in any of the covenants and agreements contained in this lease, (in addition to any other rights of tenant hereunder), and provided such default is not corrected within sixty (60) days from receipt of written notice by landlord from tenant of such condition, then, and in that event, tenant at its option may (1) correct such default and deduct any and all cost as a result of such correction from rentals due or becoming due until tenant is reimbursed in full for cost of such corrections, or (2) the tenant shall have the right, so long as default shall continue, to discontinue the payment of minimum rental.

At any time after minimum rental has been discontinued for ninety (90) days, and while landlord remains in default, the tenant may cancel this lease by a thirty (30) day written notice to landlord.

Any assent, express or implied, by the tenant to any breach of any specific covenant or condition herein contained, shall not be construed as an assent or waiver of any such covenant or condition generally or of any subsequent breach

Article VII.

Landlord and tenant agree that in the event tenant defaults in payment of the monthly rental, landlord shall give tenant written notice by certified or registered mail of such default, and tenant shall have thirty (30) days from the date of receiving such notice to correct the same. If tenant fails to correct such default within said thirty (30) day period, landlord may, after giving tenant one additional fifteen (15) day notice, at its option, terminate this lease, in which event the rental for the unexpired term of this lease shall be immediately due and payable to landlord.

Landlord and tenant agree that in the event of any default by tenant in the performance of any other covenant or agreement herein contained (other than the payment of monthly rental), landlord shall give tenant written notice by certified or registered mail of such default. If, at the expiration of sixty (60) days after service of such notice such default continues to exist, or in case of a default which with due diligence cannot be cured within sixty (60) days and tenant is not proceeding with due diligence to cure and correct the same, landlord shall then give tenant a second notice in writing by certified or registered mail; and five (5) days from receipt of such second notice landlord may, at its option, terminate this lease, in which case the monthly minimum rental for the unexpired term of the lease will be due and payable to landlord immediately. In the event tenant shall correct or cure any item of default within the time provided, then upon such correction or cure, tenant's rights hereunder shall be re-established as though said default had not occurred and said notice had not been given by landlord.

during the term, or if tenant shall be evicted from said premises by summary proceedings or otherwise, or upon the happening of any event of default, landlord may, at its election, re-enter the same by force or otherwise, without being liable for prosecution therefor, and may relet said premises at any time as agent of tenant, applying any moneys collected, first, to costs, fees and expenses of collecting, then, to the expense of obtaining possession, then, to the payment of the rent and all other sums owing and to become owing landlord and paying any surplus thereof to tenant, and such re-entry and reletting shall not discharge tenant from liability for rent or from any other covenant of this lease by it to be kept and performed.

PENALTY FOR FAILURE OF LANDLORD TO MAINTAIN COMMON AREAS

If landlord fails to do anything required of it hereunder with respect to maintenance of the common areas (including the parking area), then tenant may give landlord written notice specifying what landlord has failed to do and if landlord does not commence to correct such condition within five (5) days from the receipt of such written notice, or if landlord commences to correct such condition but does not continue the prosecution thereof with diligence, then, and in either of such events, tenant may itself correct such condition and deduct the cost thereof from any rent due or to become due under this lease by tenant to landlord.

AGENCY

~~Landlord, in consideration of the services rendered by~~ DELETED ~~, its~~ agent, in making the demised premises to tenant, hereby authorizes agent to collect all rent for all sums payable hereunder during the entire term hereof, or any extension thereof, ~~and landlord hereby agrees to pay to agent, for services rendered~~

Date 10-21-11
Lessee Initial
Lessor Initial JH

any agent ... for this lease, or any extension thereof, an amount equal to _____ (_____%) per cent of all rents paid under this lease or any extended period thereof. Landlord hereby authorizes tenant to pay all rent payable hereunder direct to agent and landlord agrees with tenant that all rent payments made hereunder by tenant to agent shall be conclusively deemed to have been made by tenant to landlord. Any notice, written or otherwise, given by tenant to landlord hereunder may, at tenant's option, be given by tenant to said agent and any notice so given by tenant to said agent shall be conclusively deemed to have been given by tenant to landlord, any notice given hereunder by tenant to agent being as effective for the purpose for which given as if such notice had been given direct to landlord. Any such notice so given by tenant to agent shall relieve tenant of the necessity of giving any further notice to landlord.

Date 10-31-11
Lessee Initial
Lessor Initial

DELETED

MARGINAL NOTATION

The capitalized notations appearing on the left margin of this lease are inserted only for the convenience of the parties, the same having no legal significance whatsoever. Such marginal notations do not purport to cover or describe the entire subject matter of this lease, or of the paragraphs or sections to which they may relate.

IN WITNESS WHEREOF, landlord and tenant have hereunto set their respective hands and seals and have executed this lease, in duplicate, as of the day, month and year first hereinabove written.

By _____
As its President
LANDLORD

_____ (SEAL)

_____ (SEAL)

_____ (SEAL)

_____ (SEAL)
LANDLORD

ATTEST:

_____
As its Assistant Secretary

DELCHAMPS, INC., An Alabama Corporation

By _____
As its President
TENANT

STATE OF ALABAMA:
COUNTY OF MOBILE:

I, _____, a Notary Public in and for the _____, hereby certify that Robert M. Weinacker, Jr., and Denny West, whose names as President and Secretary-Treasurer, respectively, of Weinacker Brothers, Inc., a corporation, are signed to the foregoing instrument and who are known to me, acknowledged before me on this day that, being informed of the contents of the instrument, they, as such officers and with full authority, executed the same voluntarily for and as the act of said corporation.

Given under my hand and official seal this 21st day of October, 1966.

_____
Notary Public in and for _____

My commission expires October 21, 1967

STATE OF ALABAMA:
COUNTY OF MOBILE:

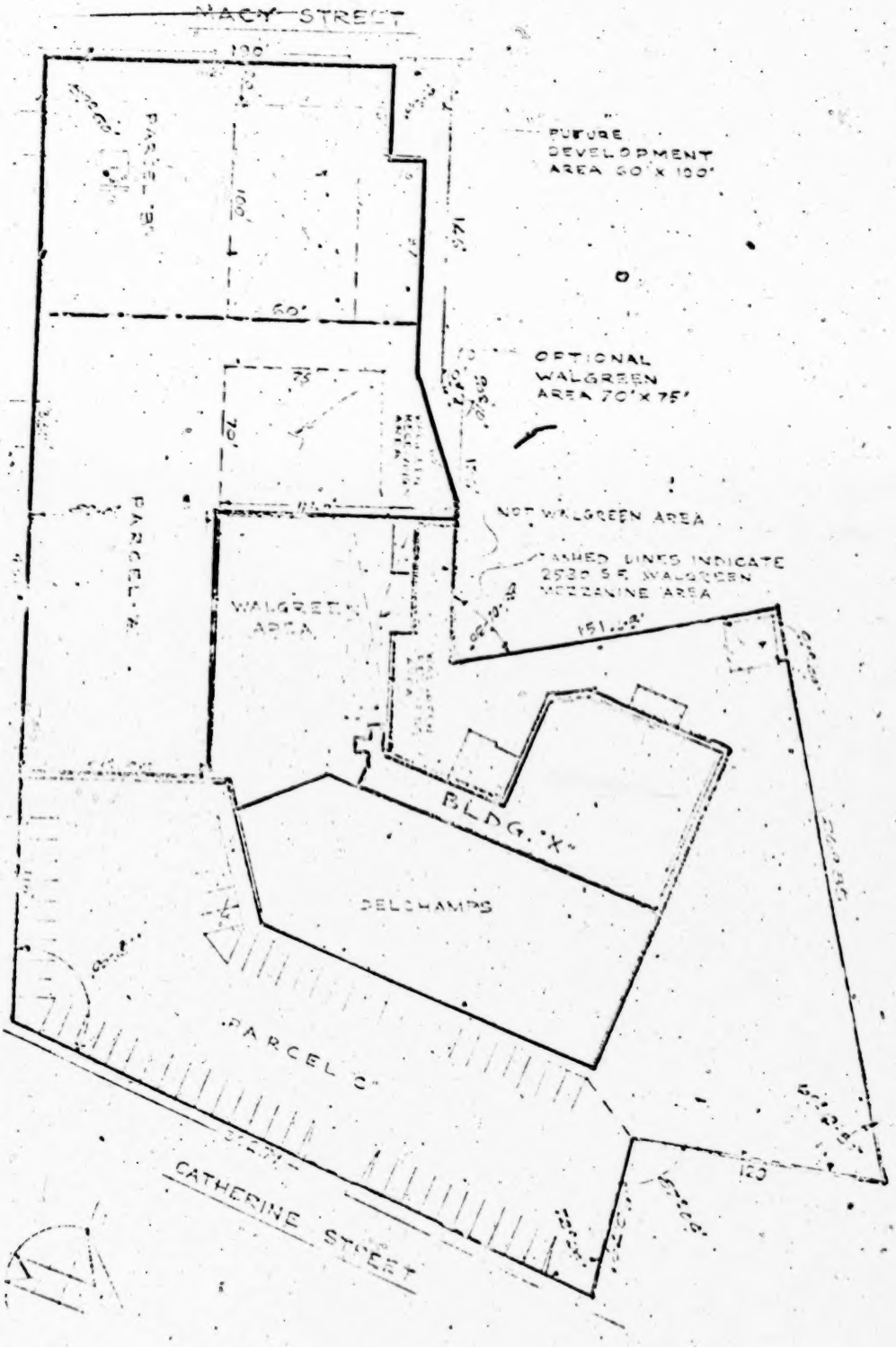
I, _____, a Notary Public in and for the _____, hereby certify that O. H. Delchamps, Sr., and O. H. Delchamps, Jr., whose names as President and Assistant Secretary, respectively, of Delchamps, Inc., a corporation, are signed to the foregoing instrument and who are known to me, acknowledged before me on this day that, being informed of the contents of the instrument, they, as such officers and with full authority, executed the same voluntarily for and as the act of said corporation.

Given under my hand and official seal this 21st day of October, 1966.

_____
Notary Public in and for _____

My Commission Expires 2-4-68

Exhibit "A"


MACY STREET
100'
PARCEL 'B'
100'
60'
FUTURE
DEVELOPMENT
AREA 60'X 100'
140'
OPTIONAL
WALGREEN
AREA 70'X 75'
70'
PARCEL 'A'
NOT WALGREEN AREA
DASHED LINES INDICATE
2520 S.F. WALGREEN
MEZZANINE AREA
WALGREEN
AREA
151.03'
BLDG. 'X'
DELCHAMPS
PARCEL 'C'
CATHERINE STREET

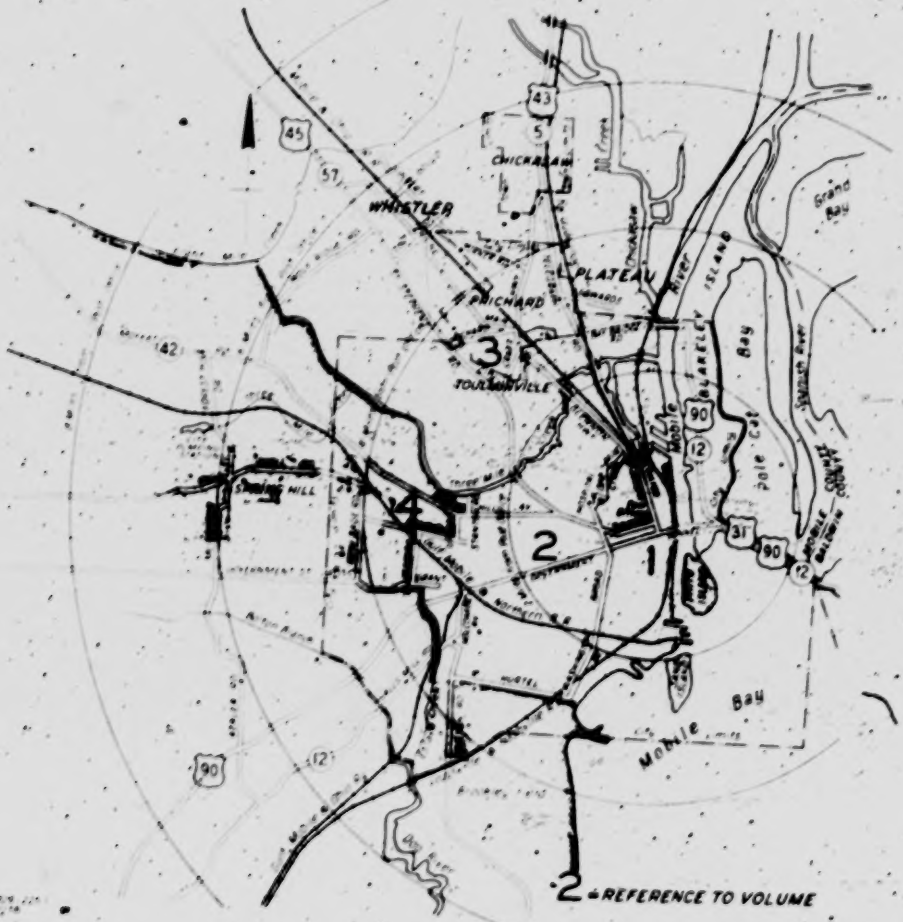
GRAPHIC MAP OF VOLUMES

MOBILE ALA

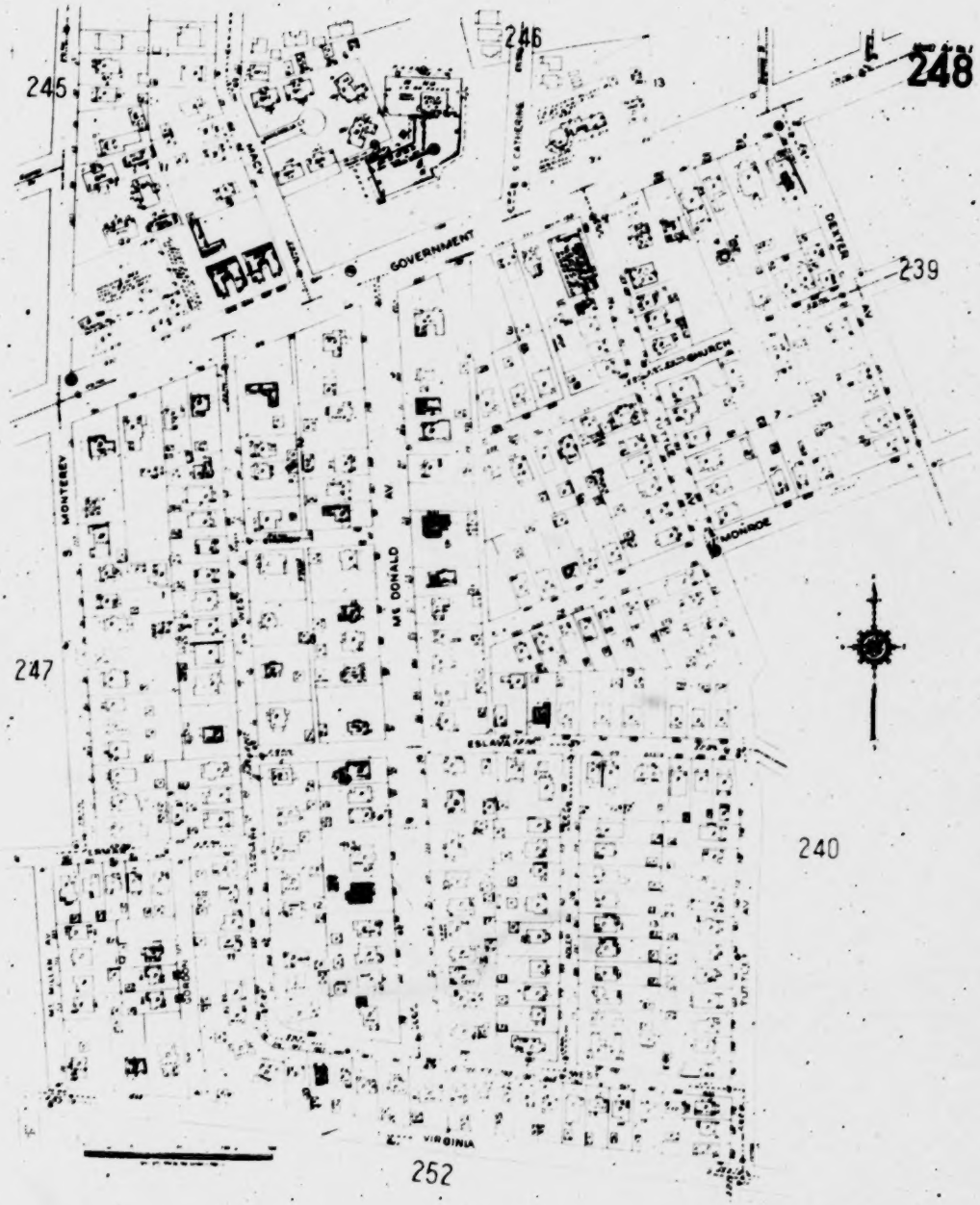
INCLUDING
CHICKASAW PLATEAU PRICHARD
SPRING HILL TOULMINVILLE &
WHISTLER

PUBLISHED BY
SANBORN MAP COMPANY
NEW YORK CITY PELHAM N.Y.

BRANCHES
CHICAGO ILL SAN FRANCISCO CAL.



VOLUME THREE
VOLUME FOUR


245
246
248
GOVERNMENT
239
MONTEREY
MC DONALD
MONROE
247
240
VIRGINIA
252